आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एफ,' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL"F" BENCH, MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य, **एवं**

श्री संजय अरोड़ा, लेखा सदस्य के समक्ष

BEFORE SHRI JOGINDER SINGH, JM

AND SHRI SANJAY ARORA, AM

ITA Nos.7398/Mum/2010
Assessment Years-2006-07

<table>
<tr><td>The ITO 25(2)(4),
C-11, 1st floor,
Pratyakshakar Bhavan,
Bandra Kurla Complex,
Bandra(E),
Mumbai-400051</td><td>बनाम/
Vs.</td><td>M/s Vandana Properties
B-602, Prem Nagar,
Bldg. No.6,
MCF Udyan Marg,
Borivali(W),
Mumbai-400092</td></tr>
<tr><td colspan="3">स्थायी लेखा सं./PAN :AAAFV3003E</td></tr>
<tr><td>(अपीलार्थी /Appellant)</td><td>..</td><td>(प्रत्यर्थी / Respondent)</td></tr>
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अपीलार्थी की ओर से / **Assessee by:**	Shri Pawan Kumar Beerla
प्रत्यर्थी की ओर से/ **Respondent by :**	Shri Vipul Joshi & Abhishek Tilak

सुनवाई की तारीख /**Date of Hearing**	**25/11/2014**
घोषणा की तारीख / **Date of Pronouncement :**	**25/11/2014**

आदेश / O R D E R

PER JOGINDER SINGH, JM:

The Revenue is aggrieved by the impugned order dated 06/08/2010 of the ld. First Appellate Authority, Mumbai on the ground that the ld. Commissioner of Income tax (Appeals) erred in allowing deduction u/s 80IB(10) of the Income-tax Act, 1961 with

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respect to an amount of Rs.16 lakh which was declared as undisclosed income by the assessee on account of extra work done for addition amenities/internal alterations probably on the request of the buyers over and above the value shown in the sale agreement.

2. At the time of hearing, Shri Pawan kumar Beerla, Ld. DR, defended the conclusion drawn in the assessment order and further advanced his arguments which are identical to the ground raised. On the other hand, the ld. Counsel for the assessee Shri Vipul Joshi along with Shri Abhishek Tilak contended that the impugned issue is covered by the decision of the Tribunal in the case of ITO vs M/s Miraj Enterprises (ITA No.4015/Mum/2010 order dated 26/03/2014) by further submitting that the decision of the Tribunal is from the same group of cases having identical facts. This factual matrix was not controverted by the Revenue with the help of any positive material.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above assertions, we are reproducing hereunder the relevant portions from the order of the Tribunal dated 26/03/2014 for ready reference.

> *"4. The solitary issue involved in the grounds, pertain to the allowance of deduction u/s 80IB(10) of the Income Tax Act, 1961. The facts involved in the case are, that the assessee is a partnership firm and is engaged in the business of builder and developer. A survey was conducted on the assessee and its sister concerns u/s 133A of the Income Tax Act, 1961, on 11.10.2005 wherein one of the partners offered Rs. 2,91,00,000/- as additional income for the group as a whole. In so far as the assessee was concerned, there was a disclosure of Rs. 95,00,000/-. The original return was accepted u/s 143(1), but since there was a disclosure of Rs. 95,00,000/-, the AO initiated reassessment proceeding and issued notice u/s 148. In the return in response to notice u/s 148, the assessee did not show the income offered separately, but included the*

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same for the claim of deduction u/s 80IB(10), which was quantified at Rs. 2,96,77,083/- by the assessee.

5. The AO, while framing the assessment sought the assessee's submission with regard to allowability of deduction claimed u/s 80IB(10) and whether the amount offered for taxation at Rs. 95,00,000/- could be included into the quantifying amount for the computation of deduction u/s 80IB(10).

6. The assessee, in response to the query raised by the AO, responded that the assessee commenced its project for housing development on 23.03.2003 as per commencement certificate dated 03.12.2002. As per the details provided by the assessee, construction of building 1 was completed on 15.12.2006 vide completion certificate issued by MCGM dated 15.12.2006 vide letter dated CHE/8362/BPWS/AP. According to the assessee the construction of this building should have been completed on or before 31.03.2008. Therefore, it can be seen, that the building was completed much before the time. Similarly the construction on building no. 2 should have been completed before 11.07.2009, but the assessee completed the construction on 06.09.2007, as per letter issued by MCGM dated 06.09.2007, reference no. CE/9018/BPWS/AP.

7. The assessee also submitted that the plot on which the development took place was 1.10 acres, as is evident from the certificate issued by the architect.

8. The assessee also submitted that in so far as building no. 1 was concerned it had flats less then 1000 sq. ft. and was having a commercial space of 1500 sq. ft and building no. 2 comprised of residential flats only and all flats had area of less then 1000 sq. ft. The assessee, therefore, submitted, that all the requirements for claiming deductions u/s 80IB(10) had been complied with.

9. These submissions and clarifications did not impress the AO, who observed that mere occupancy certificate issued by the concerned authority shall not be enough for allowance of deduction, because, in the

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survey operation, evidence had been found wherein certain flats had been amalgamated/joined together and converted by the assessee into bigger flats. This, the assessee was doing in the garb of additional amenities. Since these facts were kept under the covers, the concerned authorities did not come to know & the completion certificates were issued. These facts created doubts, as to whether the flats in question were actually less then 1000 sq. ft, particularly looking into the fact that the joint flats had one kitchen and one entrance and that they were in excess of 1000 sq.ft. and thus clearly infringed the requirements of allowance of deduction. The AO also mentions that the provision of the impugned section uses the expression "housing projects" and since there was a commercial area of 1500 sq.ft. in building no. 1, which was also sold as housing project, the claim of the assessee for deduction became ineligible. The AO, therefore, disallowed the entire claim of deduction u/s 80IB(10), which included the declared amount of Rs. 95,00,000/-, declared at the time of survey and also because it was undertaken by the managing partner of the assessee firm, that the declared amount shall not be included for the claim of deduction u/s 80IB(10). By including the surrendered sum in the qualifying amount for the claim of deduction u/s 80IB(10), according to the AO, was retraction of the amount so offered at the time of survey u/s 133A.

10. Aggrieved, the assessee approached the CIT(A), before whom, the facts and submissions made before the AO were reiterated. The CIT(A), on considering the submissions of the assessee and the order of the AO observed that for the claim of deduction u/s 80IB(10), individual plot size for individual building to be in excess of 1 acre is not necessary. He observed that in the instant case building 1 and 2 are constructed on one plot which measures 1.10 acres. This will not disentitle the assessee from the claim of deduction and, therefore, the AO was unjustified to deny the deduction.

11. On the issue of joining/amalgamation of flat area, which exceeded 1000 sq. ft., was an issue which first came in assessment year 2005-06, wherein the CIT(A), considering the evidence found in the same

survey operation u/s 133A, dated 11.10.2003, of the flats, joined together, resulting into the area exceeding 1000 sq.ft., had opined in favour of the assessee. In the appeal filed by the revenue, the coordinate Bench of the ITAT held,

"For the purpose of allowing deduction u/s 801B(10), the assessee should fulfill all the conditions mentioned therein. From the brochures found during the course of survey, it is clear that the assessee's intention was to build 3 BHK flats on 6th to 9th floors of 'A' wing. The actual construction as found during the survey is as per the plan shown in the brochures. This has thus created a doubt in minds of revenue authorities. As provided under the Explanation (iii) to clause (a) of sub-section (10) of sec 801B, the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority. In the case before us the completion certificate dated 06.01.2005 has been issued by the MCGM as constructed as per approved plan. The duty of the assessee company ends on the said date. As per the approved plan, there are no residential units having area of more than 1000 sq.ft.. Therefore, we are of the opinion, that the assessee has fulfilled the conditions prescribed u/s 801B(10) of the Act and we see no reason to interfere with the findings of the CIT(A) on this issue".

12. The CIT(A) had also given a categorical observation that no new facts had been brought to light by the AO except for the brochures.

13. The CIT(A), on commercial area & kids school further observed that, that issue was taken into consideration by Pune Special Bench of the ITAT, in the case of Brahma Associates, reported in 30 SOT 155. Based on the findings of the SB, the CIT(A), reversed the order of the AO on the objection of having commercial area/kids school in 1500 sq.ft.

14. On the issue of inclusion of Rs. 95,00,000/- in the claim of deduction u/s 80IB(10), the CIT(A) was of the view that the assessee entered into supplementary agreements with the flat owners wherein the assessee was required to provide certain extra amenities to them. The objection on which the AO developed his case was that the managing partner, at the time of survey had offered the amount of Rs. 95,00,000/- for taxation, would not be eligible for the claim of deduction u/s 80IB(10). The CIT(A) observed,

"I have considered the submissions of the representative and the stand taken by the AO. Admittedly, the appellant offered additional income of Rs. 95 lacs for this assessment year and the Managing partner further stated that the appellant

would not be entitled to deduction u/s 80IB(10) in respect of this additional income as the same was received for providing extra amenities and alternations after giving possession of flats. This is the basis on which the A.O. denied deduction u/s 801B(10). As contented by the representative, the allowance of deduction is to be decided based on the materials gathered at the time of survey and not merely on the basis of statement recorded. at the time of survey. A perusal of para 13.3(ii) shows that the amount was received on 13.12.2004 and 10.12.2004 which is before the date of occupation certificate. Further the appellant has admitted income of only Rs. 4,72,000/- from A wing and the major income of Rs. 1,97,04,583/- is from B wing of Building No. 1. The appellant has submitted occupation certificate dated 23.12.2005 respect of B wing. As on the date of survey, occupation certificate itself was not received and, therefore, the A.O. could not have concluded that the amount received represents payment for providing alterations and amenities after handing over the possession of flats. Further as far as A wing is concerned, the occupation certificate was dated 06.01.2005 which is before the date of survey and there can be some portion of receipt towards provisions of amenities after giving possession of flats. I accept the plea of the representative that the decision of the Hon'ble Mumbai Tribunal in the case of Hiralal Maganlal & Co. is not applicable to the facts of this case as it is distinguishable on account of the fact that the declaration of additional income in the case of the appellant was based on erroneous assumption of facts that the additional income was received for work carried out after the completion of project while the project (B wing) was not completed as on the date of survey. Further, the statement of the Managing Partner of the, appellant firm was not recorded under oath as in the case of Hiralal Maganlol & Co. I, therefore accept the claim of the appellant that the decision of Hon'ble Mumbai Tribunal in the case of Hiralal Maganlal & Co. is not applicable to the facts of the case. Further as contended by the representative, as the appellant does not have any other source of income except the income from "Miraj Residency" which is entitled to deduction u/s 801B(10), the AO would not be justified in denying the deduction as held by the Hon'ble Amnitsar ITAT in the case of Kashmir Steel Rolling Mills (39 TTJ 126)".

15. Upon holding that the assessee is eligible to claim the deduction even on the surrendered amount, the CIT(A) bifurcated the deduction to 75:25 by observing that "it would not be possible to determine whether the amounts received by the assessee for the purpose of offering additional amenities and alterations were before or after completion and occupation". The CIT(A), therefore, allowed the claim on income at 75% and sustained the denial of disallowance at 25% of income.

16. Against this decision, both the parties are before the ITAT.

17. Before us, the DR supported the order of the AO and claimed that the entire deduction should be withdrawn and the AR submitted that the order of the CIT(A) was correct in all respects, therefore, the entire deduction should be allowed.

18. We have heard the detailed arguments of the contesting parties. Since the surrender of additional income was made in other cases and the issues of joining the flats to make them bigger flats exceeding 1000 sq. ft. were the subject matter of other assessees and other years of the assessee, the details were called for. The AR submitted the details before the Bench and on the basis of such orders in the case of Vandana Enterprises and other years in the case of the assessee, we find that the coordinate Benches had been taking consistent stand and allowed the deduction, u/s 80IB(10) on identical facts and allowed the deduction, as claimed. The relevant portion of the order of the coordinate Bench in the case of the assessee has been reproduced earlier in this order.

19. Respectfully following the decision, based on identical facts, as in the instant case, we do not find any reason to deviate from the decision taken in assessment year 2005-06. We, therefore, hold that the assessee is eligible for the claim of deduction u/s 80IB(10).

20. Upon holding this, we are still encountered with two issues, i.e. whether there was a retraction of the statement given by the managing partner to not to include the amount of Rs. 95,00,000/- in the amount qualifying for deduction u/s 80IB(10). To adjudicate on this issue we have to consider the following:

a. *Whether at the time of survey, anything was found to suggest the source of Rs. 95,00,000/- to be not the part of the existing business;*
b. *Whether the source of Rs. 95,00,000/- is the business of the assessee or something else; and*
c. *Whether the statement given oath u/s 133A is binding and cannot be retracted.*

21. So far as (a) is concerned, the CIT(A) has concluded that the AO has not brought any new facts for the year under consideration. The facts that emerged at the time of survey u/s 133A, remain as it is and also that they were considered even in assessment year 2005-06 as well, wherein the coordinate Bench has allowed the claim.

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22. Coming to (b), as observed us in (a) no new material has been brought to light for the instant year by the AO, the facts are evident that whatever funds were received by the assessee, pertained to and had direct nexus with the business of the assessee and no other source, therefore, though the impugned amount was additionally offered it still remained receipt/income pertaining to the business. It is, in any case, a settled line of adjudication that any claim for deduction under Income Tax Act are dependent upon the conditions laid down under the provisions of the Act and there are requisite formalities which are required to be done as per the law. Once these conditions are fulfilled, the assessee is entitled for statutory deduction or claim to which he is entitled to. Mere consent or acquiescence by the assessee cannot take away the otherwise a legitimate claim to which he is entitled to. It is an admitted position of law that an admission or acquiescence cannot be a foundation for assessment where the income is returned under erroneous impression or misconception of law. It is otherwise open to the assessee to demonstrate and satisfy the authorities concerned that his particular income was not taxable or claim for deduction is otherwise lawfully allowable, to him. If in law, an item is not taxable, no amount of admission can be made taxable. In view of the said principle, it was to be held that even though the assessee had surrendered its claim before the Assessing Officer, the same could be challenged on merits if it had a strong case for such a claim based on facts and material on record and conditions relevant for claiming such deduction stood fulfilled.

23. Hon'ble Bombay High Court in the case of CIT vs Sheth Developers (P) Ltd, reported in 254 CTR 127 (Bom) (copy filed before us), held,

"Explanation to sub-s (1) of s 158BB was amended by the Finance Act, 2002 with retrospective effect from 1st July, 1995. Prior to the amendment, according to the Explanation, the total income or loss was to be computed in accordance with Chapter IV. Consequent to the amendment by Finance Act, 2002 with retrospective effect from 1st July, 1995, the total income or loss has to be computed in accordance with the provisions of this Act. Consequently, w.e.f. 1st July, 1995 the total income/loss for the block period has to be computed 3n accordance with the provisions of the Act and the same would include Chapter V/-A. Sec 80-lB is a part of Chapter VI-A. In view of the above, while computing the undisclosed income for the block period the respondent assessee is entitled to claim deduction from its income under s. 80-lB. It is not the case of the Revenue that the money found in possession of the assessee could not be explained and/or its source could not be explained to the satisfaction of the AO. In the present case undisclosed income found in the form of cash was explained as having been acquired while carrying on business as a builder and this explanation was accepted by the AO by having assessed the undisclosed income for the block period as income from profits and gains of business or profession. In

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the present case, no question of application of ss. 68, 69 and 69A, 69B and 69C arises as the same has not been invoked by the Department. It is an admitted position between the parties as reflected even in the order of the AO that undisclosed income was in fact received by assessee in the course of carrying out its business activities as a builder".

24. From the above it is clear that the assessee surrendered the income, whose only source, was the business of the assessee.

25. On these observations, we are of the view that the claim of the assessee to include Rs. 95,00,000/- in the computation of deduction u/s 80IB(10) is in accordance with law and must be allowed and we therefore sustain the order of the CIT(A).

26. Coming to (c), whether the statement on oath u/s 133A is binding and cannot be retracted, we have to make a categorical observation, here that statement given u/s 133A is not on oath. Section 133A(iii) observes, "record a statement of any person which may be useful for, or relevant to, any proceeding under the Act". Therefore the statement made by the managing partner to not to include the amount of Rs. 95,00,000/- in the claim of deduction would have no relevance, first on the fact that the statement was made u/s 133A. Secondly, even if the statement was recorded on oath, the assessee has prerogative to change his/its stand, after taking into consideration the facts that emerge from the papers seized or impounded. The law does not bar or create any type of estoppel, to retract from the statement, even if given on oath, if the facts are otherwise. Hence, the assessee was correct to include the amount offered in the qualifying amount of the claim for deduction u/s 80IB(10)."

2.2. If the observation made in the assessment order, conclusion drawn in the impugned order, material available on record and the assertions made by the ld. Respective counsel, if, kept in juxtaposition and analyzed, we find that impugned issue is covered by the decision of the Tribunal, wherein the decision from Hon'ble jurisdiction High Court in the case of CIT vs Sheth Developers (P.) Ltd. 254 CTR 127

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(Bom) has been discussed. It is also noted that survey action u/s 133A of the Act was carried out on 11/10/2005, wherein statement of Jagat V. Shah, managing partner of the assessee firm was recorded on 11/10/2005. The assessee received some part of sale consideration in cash on the request of the customers and in reply to question no. 14 he specifically tendered that the impugned amounts were transacted in cash and thus a voluntary disclosure of additional income of Rs.2.91 crores was made over and above the normal business income. The break up of the said disclosure is as under:-

Name of the firm	**Ass. Year.**	**Amount (Rs.)**
M/s Vandana Builders	2005-06	60,00,000
	2006-07	15,00,000
M/s Vandana Enterprises	2005-06	75,00,000
	2006-07	30,00,000
M/s Vandana Properties	2006-07	16,00,000
M/s Miraj Enterprises	2006-07	95,00,000
	Total	**2,91,00,000**

The totality of facts clearly indicates that the disclosure is off shoot of survey carried out on 11/10/2005 on the same group out of which on identical fact the case of M/s Miraj Enterprises (Supra) has been decided by the Tribunal. No new fact has been brought on record by either side before us. Respectfully following the aforesaid decision of the Tribunal that too in the same group/identical facts, we find no infirmity in the conclusion drawn by the ld. Commissioner of Income tax (Appeals). It is affirmed, resulting into, dismissal of appeal of the Revenue.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced, in the open court, in the

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presence of ld. Representative from both sides at the conclusion of the hearing, on 25th November, 2014.

Sd/-	***Sd/-***
(SANJAY ARORA)	**(JOGINDER SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated.- 25/11/2014

Shekhar, P.S./नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- Concerned, Mumbai
4. आयकर आयुक्त / CIT – **Concerned, Mumbai**
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai E Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai.**